(27,439)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 684.

PIEDMONT POWER & LIGHT COMPANY, APPELLANT,

vs.

THE TOWN OF GRAHAM *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 26, 1920.

1 UNITED STATES OF AMERICA,
Western District of North Carolina:

At a District Court of the United States for the Western District of North Carolina, begun, opened and held at the Court House in the City of Greensboro, on the 18th day of November 1919.

Present: Hon. Jas. E. Boyd, Judge of the Western District of North Carolina.

Among others were the following proceedings, to-wit:

In Equity.

PIEDMONT POWER & LIGHT COMPANY

vs.

TOWN OF GRAHAM, R. L. HOLMES, Mayor; J. C. WALKER, JAMES Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham; Mutual Power & Light Company.

2 *Bill of Complaint.*

Filed October 25th, 1919.

In the District Court of the United States for the Western District of North Carolina, at Greensboro.

In Equity.

PIEDMONT POWER & LIGHT COMPANY, Complainant,

vs.

TOWN OF GRAHAM, R. L. HOLMES, Mayor; J. C. WALKER, JAMES Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham; Mutual Power & Light Co., Defendants.

Bill of Complaint.

To Honorable James E. Boyd, Judge United States District Court for Western District of North Carolina:

Now comes the Piedmont Power & Light Company, a corporation under the laws of North Carolina, having its principal office at Burlington, North Carolina, prays the Court that it be allowed to file its Bill of Complaint in this cause as follows:

And thereupon your complainant complains and alleges as follows:

1. The complainant is a corporation under the laws of the State of North Carolina hereinafter referred to as the Piedmont Company.

2. The Defendant, Town of Graham, is a municipal corporation under chapter 40 Private Laws of North Carolina of 1899, to which reference is made to the same for its term in full.

3. That the Defendants, R. L. Holmes is Mayor of the Town of Graham, and Messrs. J. C. Walker, James Rich, J. Harvey White, J. Elmer Long and R. G. Foster are the Commissioners of the said Town of Graham.

4. The Defendant, Mutual Power & Light Company is a corporation organized under the laws of the State of North Carolina for the purpose of doing a power and light business in the Town of Graham, and elsewhere in Alamance County.

5. That the amount in controversy in this suit exclusive of interest and costs exceeds the sum of ($3,000.00) Three Thousand Dollars.

6. The Piedmont Company has outstanding a first mortgage bond issue of ($735,000.00) Seven-hundred and Thirty-Five Thousand Dollars, and over ($200,000.00) Two-hundred Thousand Dollars is used in serving the Town of Graham, its inhabitants and consumers of electric current therein.

3 7. The Piedmont Company is the owner of a franchise duly granted by the Board of Commissioners of the Town of Graham on March 26th, 1913, under the power contained in paragraph 6 of section 2916 of the Revisal of 1905 as amended as follows:

Section 2916, Paragraph 6.

"To grant upon reasonable term franchises for public utilities, such grants not to exceed the period of sixty years, unless renewed at the end of the period granted; also to sell or lease any waterworks, lighting plants, gas or electric or any other public utility which may be owned by any city of town."

Said franchise contains the following grants of property rights:—

1. That the said Town of Graham, for and in consideration of the Sum of Five Dollars ($5.00) per annum, to be due and payable annually during the month of April of each and every year after the date of the passage of this ordinance, and other valuable considerations herein secured and reserved, has granted to the said Graham Water & Electric Company, (hereinfter referred to as the "grantees"), their successors and assigns, the right and privilege to erect and maintain towers, poles and conduits, and to strike and place wires, cables and other appliances thereon, now or hereafter in use for the purpose of conveying and distributing electric current upon, over and under all the public streets, alleys and ways now in use or hereafter laid out in the corporate limit- of the town of Graham as it is now constituted, or any additional territory which shall be added to said town.

All their rights and privileges are granted upon and subject to the conditions and limitations set out in the following paragraphs of this ordinance;

2. Said grantees, their successors and assigns shall at all times keep and maintain all its towers poles, wires and appliances of all kinds in, over or under the streets, alleys, lanes or ways of said town of Graham in a perfectly safe condition and in such as in no way to interfere with public travel, and they and their assigns shall be bound, during the term of which they make use of the privileges herein granted, to at all times save the said town of Graham harmless in every way.

3. Said grantees, their successors and assigns shall not in any way interfere with any pole, wire, water main, hydrant or any appliance connected with the system of water works or sewerage, or with any gas pipes or works maintained in said town of Graham, or that may hereafter be legally placed or erected in said town.

4. Said grantees their successors and assigns shall not cut or trim trees growing in or over any of said streets, alleys and ways of said town of Graham, but said town of Graham hereby warrants that it will, by its proper authorities, provide for the full and free use of its streets, lanes, alleys and bridges, as provided in section Eleven Hundred and Thirty-three, (1133) and upon request shall promptly locate all towers, poles, conduits and other fixtures required by the said grantees, their successors and assigns, so that said grantees, their successors and assigns may enjoy and exercise the privileges conferred hereby, and in case any trees growing in any of the streets or overhanging the same, shall interfere with the supply of electric current along the same, the said town of Graham hereby agrees to keep the same trim to such an extent as may be necessary to prevent the interference with said electric current: Provided, said grantees, their successors and assigns shall pay the expense of trimming any trees trimmed for their benefit.

4 A certified copy of said franchise is filed in this action as exhibit "A."

8. The town of Graham having granted a franchise "for the purpose of conveying electric current upon, over and under all the public streets "of the Town of Graham" and warranted "The full and free use of its streets," for valuable considerations reserved, is without power in law to grant the same, or any part thereof, to any other person, firm or corporation for a like purpose.

9. That the franchise granted to the Graham Water & Electric Company, and now owned by the Piedmont Power & Light Company, is property within the meaning of the Constitution of the United States, and is a contract for the use of all the streets of the Town of Graham for a valuable consideration, and not subject to impairment or invasion within the meaning of the constitution of the United States.

By attempting to grant another franchise to exercise the same rights and privileges as here-to-fore granted, or any portion thereof, is taking property and impairing a contract, and is a violation of the Constitution of the United States and of Complainant's rights thereunder.

10. Complainant alleges that the rates which it may charge, the duties which it must perform, and service rendered are under full and complete control of the State of North Carolina by its Corporation Commission, and therefore Complainant cannot ever under these circumstances acquire a monopoly of the sale of electric current in the Town of Graham.

11. Complainant alleges that it is the owner of a Special privilege granted in consideration of public services, and its employment of Capital in public duties, subject to public regulation, duly granted, accepted, and performed, under and by virtue of the Constitution of the State of North Carolina and a statute enacted thereunder and a valid ordinance duly and lawfully granted.

12. The Mutual Power & Light Company applied to the Mayor and Board of Commissioners of the Town of Graham for a franchise in the following words and figures, to-wit:

Be it Ordained by the Mayor and Board of Commissioners of the Town of Graham, Alamance County, North Carolina.

Section 1. That the Town of Graham has and does hereby grant unto the Mutual Power & Light Company, a corporation of the State of North Carolina, (hereinafter referred to as the grantees) with principal office and place of business in the City of Burlington, Alamance County, North Carolina, and their successors and assigns, the right and privilege to erect and maintain towers, poles and conduits, and to string and place wires, cables and other appliances thereon, such as are now, or may hereafter be in the use for the purpose of conveying and distributing electric current, to be used for all purposes for which such current is, or may be used upon, over and upon all the public streets, alleys and ways now in use or hereafter laid out in the corporate limits in the said town as it is now constitutes or in any additional territory which shall be added to said town. All these rights and privileges are granted upon, and subject to, the conditions and limitations set out in the following paragraph of this ordinance.

Section 2. The said grantees, their successors and assigns shall at all times keep and maintain all of its towers, poles, wires, and appliances of all kinds, in, over, or under the streets, alleys, lanes or ways of said town, in a perfectly safe condition, and in such way as in no way to interfere with public travel; and they and their assigns, shall — bound during the term for which they make use of the privileges herein granted, but at all times save the said town harmless in every way.

Section 3. The said grantees, their successors and assigns shall not in any way interfere with any poles, wires, water mains, hydrants, or any appliances connected with the system of water works, sewerage, gas pipes, electric or telephone companies maintained in said town, or that hereafter may be legally placed or erected in said town.

Section 4. The said grantees, their successors and assigns, shall not cut or trim trees growing in or over any of the streets, alleys, or ways of said town, but said town hereby warrants that it will by its proper authorities, provide for the full and free use of its streets, lanes, alleys and ways, as provided in section 1133 of the Revisal of 1905; and upon request shall promptly locate all towers, poles, conduits and fixtures required by said grantees, their successors and assigns, so that said grantees, their successors and assigns may enjoy and exercise the privileges conferred hereby, and in case any tree growing in any of its streets, or overhanging the same, shall interfere with the supply of electric current along the same, the said town hereby agrees to keep the same trimmed to such an extent as may be necessary to prevent interference with said electric current provided the said grantees, their successors and assigns, shall pay the expense of trimming any trees trimmed for their benefit.

Section 5. The said grantees, their successors and assigns shall immediately repair any street, way or public place, injured by them in the erection, construction, operation or maintenance of any of its poles, towers, conduits, wires or other appliances, owned and used by them, their successors and assigns, and they shall repair such street, way or public place, so that it shall be in all respects — as good condition as before disturbed by said grantees, their successors and assigns.

Section 6. The said grantees, their successors and assigns shall only erect and maintain its poles, towers, conduits, wires or other appliances as the same may be necessary to supply electric current for use for lighting or power; to such persons, firms or corporations as shall apply to this board, or to its duly constituted successors, to have power supplied by said grantees, their successors and assigns, and to which this board shall permit power to be supplied, and provided further that the rates to be charged, by said grantees, for current for power or light shall at all times be subject to all the rate fixing powers vested in this board by the laws of the State of North Carolina.

Section 7. The said grantees, their successors and assigns, shall only erect and maintain its poles, towers, conduits, wires or other appliances upon, over and under such public streets, alleys or ways, in the corporate limits of said town as this board, or is successors, shall designate upon application by said grantees, their successors and assigns.

Section 8. The franchise, right and privileges, hereby granted exist for a period of fifty (50) years from the date of the passage thereof.

13. On August 4th, 1919 the following action was taken:

(1) Moved by White, duly seconded and carried that vote of last meeting in regard to Mutual Power Company franchise be rescinded, on account of Mr. White's future connection with the Mutual Power Company.

6 (2) Motion by Walker duly seconded that the board of Commissioners of the Town of Graham grant franchise to Mutual Power Company as requested. Upon roll call the vote was as follows:—"Foster, No; White, Not voting; Rich, Yes; Walker Yes. 2 for -o 1 against, one not voting. Declared carried on the first vote. Second vote to be taken at the next regular meeting in September."

14. On September 1st, 1919, at a meeting of the board of Commissioners of the Town of Graham the following action was taken:

(1) Moved by White, duly seconded and carried that vote of last meeting in regard to the Mutual Power Company franchise, be rescinded, on account of Mr. White's future connection with the Mutual Power Company;

(2) Motion by Walker duly seconded that the Board of Commissioners of the Town of Graham grant franchise to Mutual Power Company as requested. Upon roll call the vote was as follows: Foster, No; White, not voting, Rich, Yes; Walker, Yes. 2 for, 1 against, 1 not voting. Declared carried.

15. Section- 13 and 19, Chapter 40 of the Private Laws of 1899 herein before referred to as the Act of Incorporation of the Town of Graham reads as follows:

Section 13. That (a) majority of said Commissioners shall constitute a quorum for the transaction of business.

Section 19. The Commissioners of said Town shall — the power to make such by-laws and adopt such ordinances for the government of said town as a majority of them may deem necessary to promote the interests and insure the good order of said Town; for the improvement of the streets and the preservation of the health of the same, and to make all such other regulations as the interest, comforts and conveniences of the citizens of the said town may require."

16. Under Chapter 136 of the Public Laws of 1917, as contained in chapter 3, section 1 of said Act the Corporation Commission is authorized "to fix and establish any and all rates" in any City or Town.

17. Under Chapter 127 of the Public Laws of 1913, the Corporation Commission has like power outside of the corporate limits of any town or city.

18. The Complainant alleges upon information and belief:—

(a) That the attempt to grant the franchise referred to is invalid and unlawful in that only two members of the Board of Commis-

sions of the town of Graham, out of the board composed of five members, voted in the affirmative, or in favor of the adoption of the ordinance referred to, granting the franchise.

(*b*) That as aforesaid it is the duty and within the power of the Corporation Commission of the State of North Carolina to "fix and establish" the rates for the service supplied by the Piedmont Company, and to fix such rates as will yield on the actual invested capital a reasonable return on the same.

7 (*c*) That owing to the slow growth of the power and light business, requiring much investment, and long time to reach small consumers, and the unusual high cost of labor, supplies and fuel for the past four years, the investment has not up to this time yielded a fair and reasonable return on the capital invested.

(*d*) That complainant is a tax payer in the town of Graham.

(*e*) That by granting a franchise to a corporation to do public power and light business, the business of Piedmont Company in the Town of Graham is likely to greatly diminish in volume and its costs of supplying current to the inhabitants of the Town of Graham greatly increased thereby making it necessary for the said Piedmont Company to apply to the Corporation Commission for an increase of the rates now charged, in order to prevent confiscation of its investment, and in order for said Piedmont Company to pay a fair and reasonable return on the capital invested in said Company.

(*f*) The Mutual Power & Light Company has not yet made any investment in physical property.

(*g*) The Mutual Power & Light Company has not asked the corporation Commission to reduce the rates charged by the Piedmont Power & Light Company.

(*h*) That the persons, firms and corporations promoting the Mutual Power & Light Company can be as well supplied with electric power by the Piedmont Company and at the same price, for the same service, without dividing the volume of business owned by the Piedmont Company, and thereby causing irreparable injury to complainant, and the community served.

19. That the State of North Carolina by enacting chapter 127 Public Laws of 1913, and chapter 136 of Public Laws of 1917, as contained in chapter 3 of the said act, has declared the Legislative intention of limiting the return on property devoted to public use to fair and reasonable amount and intention thereby to secure for all towns, cities, persons, firms or corporations in North Carolina the benefit of the entire volume of business offered by him in any community, and having conferred the powers of said Acts on the Corporation Commission of the State, the Town of Graham is without power to grant a competi-ve franchise for supplying electric current. Said Acts are broad and comprehensive, securing for every

town, city, person, firm or corporation in North Carolina and adequate remedy against unfair rates and poor service.

8 20. That the Board of Commissioners of the Town of Graham by attempting to grant a franchise to the Mutual Power & Light Company for the purpose of dividing the volume of business now done by the Piedmont Company, *it* attemptng to take the property of complainants with out due process *to l*aw, in violation of Article VLV of the Constitution of the United States. The complainants invoke the protection of said Article in their behalf.

21. That due process of the law in the circumstances herein set out, would be by a hearing before the Corporation Commission of North Carolina at the instance of any town, city, person, firm or corporation aggrieved at the rates charged, or service furnished by the Piedmont Company.

22. That unless the defendants are enjoined the complainants will be deprived of their property without due process of law guaranteed to them under the Constitution of the United States.

23. That the Mutual Power & Light Company has applied to the City of Burlington, in the County of Alamance, for a franchise similiar or perhaps identical to the one herein set out, but which up to this time has not been acted upon by the Board of Aldermen of the City of Burlington, but is still pending. Complainant is the owner and user of a franchise in the City of Burlington similar to the one owned in the Town of Graham.

24. The generation of electric current for North Carolina east of the Blue Ridge Mountains, for use in the industrial section of the State, is done by the Southern Power Company, and its subsidiaries to the extent of 250,000 kilowatts, and by the Carolina Power & Light Company to the extent of 20,000 kilowatts by water, and 5,000 kilowatts by steam, and the lines of these Companies are interconnected in North Carolina at Durham, and at or near Camden in South Carolina.

25. The lines proposed to be built by the Mutual Power & Light Company, as complainant is informed and believes are leased as if, and when finished and the franchises secured, to the Southern Power Company to be used by it for distributing current over the same streets in the Town of Graham which have been granted to the complainant, and the use of the same warranted to complainant.

26. Complainant is the owner of a large steam plant of 5,500 kilowatts capacity, located between the city of Burlington and the Town of Graham, (except for one piece of apparatus not yet installed on account of the effort to secure the franchises referred to) and is a purchaser during high water periods of current delivered by the Southern Power Company to complainant's transformer station.

27. This investment was made in good faith by complainants relying upon the protection of the contract and due process clauses

of the Constitution, which complainant believes and alleges the defendants are attempting to violate.

Wherefore the complainants pray:

(1) That the ordinance attempting to grant a franchise to the Mutual Power & Light Company be declared void for failure to adopt them in the manner required by the Charter of the Town of Graham,

(2) That the town of Graham, its officers, Mayor, and Board of Commissioners of the Town of Graham, be permanently enjoined from certifying the ordinance to the Mutual Power & Light Company referred to in the Bill of Complainant.

9 (3) That the Mutual Power & Light Company be permanently enjoined from acting under any part of said ordinance within the corporate limits of the Town of Graham.

(4) That this Court declare the Town of Graham without power to grant an additional franchise to any person, firm or corporation to carry on the electric power and light business, or to engage in it under the laws of North Carolina now in force.

(5) That the Mutual Power & Light Company, its officers and attorneys be enjoined from applying to the City of Burlington for a franchise described in the Bill of Complaint.

(6) That all other and such further general relief be granted complainants as may be just and right in the premises.

J. H. BRIDGERS (*Henderson, N. C.*),
JOHN J. HENDERSON (*Graham, N. C.*),
Solicitors for the Complainants.

STATE OF VIRGINIA,
City of Richmond, ss:

J. R. Paschall, Vice President of the complainant Company being duly sworn says that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

J. R. PASCHALL,
V. President.

Sworn to and subscribed before me on this the 8th day of October 1919.

[SEAL.] R. S. FRIEND,
Notary Public.

My commission expires 4/15/22.

EXHIBIT "A."

Filed December 23, 1919.

Be it Further Ordained:

Section 1. That the said Town of Graham, for and in consideration of the sum of Five Dollars ($5.00) per annum, to be due and payable annually, during the month of April of each and every year after the date of the passage of this ordinance, and other valuable considerations herein secured and reserved, has granted into the said Graham Water and Electric Company (hereinafter referred to as the "grantees"), their successors and assigns, the right and privilege to erect and maintain, towers, poles and conduits, and to string and place wires, cables and other appliances thereon, now or hereafter in use for the purpose of conveying and distributing electric current upon, over and under all the public streets, alleys and ways, now in use or hereafter laid out in the corporate limits of the town of Graham as it is now constituted, or any additional territory, which shall be added to said town. All these rights and privileges are granted upon and subject to the conditions and limitations set out in the following paragraphs of this ordinance;

Section 2. Said Grantees, their successors and assigns shall at all times keep and maintain all its towers, poles, wires and appliances of all kinds in, over or under the streets, alleys, lanes or ways of said town of Graham in a perfectly safe condition and in such as in no way to interfere with public travel, and they and their assigns shall be bound, during the term of which they make use of the privileges herein granted, to at all times save the said town of Graham harmless in every way.

Section 3. Said Grantees, their successors and assigns shall not in any way interfere with any pole, wire, water main, hydrant or any appliance connected with the system of waterworks and sewerage, or with any gas pipes or works maintained in said town of Graham, or that may hereafter be legally placed or erected in said town.

11 Section 4. Said grantees, their successors and assigns, shall not cut or trim trees growing in or over any of said streets, alleys and ways of said Town of Graham, but said town of Graham hereby warrants that it will, by its proper authorities, provide for the full and free use of its streets, lanes, alleys and bridges, as provided in section Eleven Hundred and Thirty-three (1133) of the Revisal of One Thousand, Nine Hundred and Five (1905) and upon request, shall promptly locate all towers, poles, conduits and other fixtures required by the said grantes, their successors and assigns, so that said grantees, their successors and assigns may enjoy and exercise the privileges conferred hereby, and in case any trees growing in any of the streets, or overhanging the same, shall interfere with the supply of electric current along the same, the said Town hereby agrees to keep the same trimmed to such an extent as may be necessary to prevent the interference with said electric current; provided, said

grantees, their successors and assigns shall pay the expense of trimming any trees trimmed for their benefit.

Section 5. Said grantees, their successors and assigns, shall immediately repair any street, way or public place injured by them in the erection, construction, operation or maintenance of any of its poles, towers, conduits or other appliances owned and used by them, their successors or assigns, and they shall maintain the place so injured in good condition of six months after said injury.

Section 6. Said grantees, their successors and assigns shall maintain such a system of wires in, over and under the streets, ways or alleys of said town as shall be necessary to supply said town with lights as desired by said town, and to supply the individuals, firms and corporations with current for lighting or for other purposes, taken from their lighting circuit, as shall be desired by said
12 individuals, firms or corporations, who shall comply with the reasonable rules and regulations of said grantees, their successors and assigns, not in conflict herewith, as to the payment of bills.

Section 7. Said grantees their successors or assigns, shall never charge the said town for lights a greater sum than the following schedule, to-wit: If said town shall take lights aggregating less than fifty (50) lights of three hundred and fifty (350) watts each, then said grantees, their successors and assigns shall supply these lights in such units as said town desires, at the following rates: for one three hundred and fifty (350) watt unit, Seventy two dollars ($72.00) a year; for one two hundred (200) watt unit, Forty two dollars ($42.00) per year, for one one hundred (100) watt unit, Twenty Four Dollars per year; if said town shall take lights aggregating more than fifty (50) and less than Eighty five (85) three hundred and fifty (350) watt units, then said grantees, their successors and assigns, shall supply these lights in such units as said town shall desire at the following rates; for one three hundred and fifty (350) watt unit, Sixty Five Dollars ($65.00) per year, for one two hundred (200) watt unit, Forty Dollars ($40.00) per year, for one one hundred (100) watt unit, Twenty Two Dollars ($22.00) per year. If said town shall take lights aggregating eighty five (85) units or over, of three hundred and fifty (350) watts each, then said lights shall be supplied at the following rates: For one three hundred and fifty (350) watt unit, Sixty dollars ($60.00) per year; for one two hundred (200) watt unit, Forty Dollars ($40.00) per year, for one one hundred (100) watt unit, Twenty Dollars ($20.00) per year; all lights to be supplied hereunder to be kept burning during all hours from thirty (30) minutes before sun down until thirty (30) minutes after sunrise.

The town at its option may take in lieu of three hundred and fifty (350) watt Tungsten incandescent lamps, four (4) ampere
13 series Magnetite arc lamps, and these shall be supplied at the following schedule: If the town shall take less than fifty (50) units of these lights, they shall be supplied at the rate of Seventy-Two Dollars ($72.00) per year; if the town shall take more than fifty (50)

of these lights and less than eighty five (85) they shall be supplied at the rate of Sixty-five Dollars ($65.00) per year; if the town shall take eighty five (85) or more of these lights, they shall be supplied at the rate of Sixty Dollars ($60.00) per year.

Said grantees their successors and assigns, shall furnish the fixtures and lamps and current for running the lamps, for a cluster light containing five (5) lights. (The lights referred to in this paragraph *is* similar to *the* situate at the corner of Main and Front Streets in the City of Burlington, North Carolina, that was placed by the Chamber of Commerce of said City). These fixtures and lights shall be furnished, and the current supplied therefor, at the rate of thirty five dollars, ($35.00) per annum; provided that the lamps going to make up said cluster light shall be kept burning only from six o'clock P. M. until eleven o'clock P. M. of each night. These lights shall be furnished to the municipality or any individual, firm or corporation which shall desire the same and which shall pay the above rate therefor.

Section 8. Said grantees, their successors and assigns shall never charge the individuals, firms or corporations of said town for current for lights or for current for any purpose, a rate in excess of ten (10) cents per one thousand (1,000) watts, and in the event the individuals, firms and corporations who take current for lighting, or for any other purpose, which they take from the lighting circuit maintained by said grantees their successors and assigns, shall pay for the current used during a preceding month on or before the fifteenth (15th) day of the succeeding month, they shall have the right to demand,
and shall receive, a discount of ten per cent, (10%) per one
14 thousand (1,000) watts, making said current cost said consumer who pays for the preceding month on or before the fifteenth day of the succeeding month, nine cents (9) per one thousand (1,000) watts; provided, that where any taker consumes current in any one month at the above rate (without discount) that amounts to ten dollars ($10.00) or more, then such taker shall be entitled to a discount of one per cent (1%) for each whole dollar of the bill, up to Fifty Dollars ($50.00) if the bill for a preceding month is paid on or before the fifteenth (15th) day of the succeeding month. Bills of the Fifty Dollars ($50.00) and over shall be discounted fifty per cent (50%) if the bill of a preceding month is paid on or before the fifteenth (15th) day of the succeeding month. Provided, further, that these parties who use current for lighting or for any purposes, taken from the lighting circuit maintained by said grantees, shall not use current which, at the above rates, would amount to more than fifty (50) cents per month (without discount) then said parties shall be charged a minimum charge of fifty (50) cents per month.

The grantees, their successors or assigns, shall supply current continually for a capacity of one hundred (100) watts per month from its lighting circuit at One Dollar ($1.00) per month, flat rate; for one hundred and twenty five (125) units, One Dollar and Twenty Five Cents ($1.25) per month, for One Hundred and fifty (150) Watts, One Dollar and Fifty Cents ($1.50) per month, for one hundred and seventy five (175) watts One Dollar and Seventy Five Cents

($1.75) per month, and for two hundred (200) watts, Two Dollars ($2.00) per month, all of the above charges indicated as flat rates to be subject to a discount of ten per cent (10%) if bills of a preceding month are paid on or before the fifteenth (15th) day of the succeeding month; provided, that all parties who take current from the lighting circuit under this flat rate schedule shall have installed an excess indicator, to prevent increase of the capacity applied
15 for.

The grantees, their successors and assigns, shall supply for renewal to their customers, free of charge, carbon and metalized filament lamps, it not being intended herely to supply Tungsten filament lamps free; but in the event customers desire Tungsten filament lamps, they shall be supplied at Market Price, less the price of carbon filament lamps of the same rated capacity.

Said grantees, their successors or assigns, shall at their own cost extend the wires from their mains to the buildings of the structure in which customers shall desire to use current taken from lighting circuit.

Section 9. Said grantees, their successors and assigns may erect and maintain in, under and over the streets and ways of said town wires from which they may supply electric current for power to said town and the individuals, firms and corporations thereof. Said grantees, their successors and assigns, shall never charge for electric current for power in excess of the following schedule: For each horse power, five (5) cents per kilo watt hour, for the first twenty (20) kilo watts hours; for the next one thousand (1,000) kilo watt hours, three (3) cents per kilo watt hour; for all excess, one and one-half (1½) cents per kilo watt hour; Should the individuals, firms and corporations, taking current for power pay for the power used in a preceding month on or before the fifteenth (15th) day of the succeeding month, then they shall have the right to demand, and shall receive a ten per cent (10%) discount from the above rates.

There shall be a minimum charge to all power takers of One Dollar ($1.00) per month for each connected horse power, provided: current to this amount is not used.

Section 10. Should said grantees, their successors and assigns ever wilfully and knowingly raise the rates and charge said town
16 more for lights, or the said individuals, firms and corporations more for current for lighting purposes and for other appliances, supplied through the lighting circuit, or wilfully or knowingly charge the municipality or the individuals firms and corporations who take current for power a greater sum than the schedule set forth herein, and fail for ten (10) days after written request so to do to refund such overcharge, then said grantees, their successors and assigns shall forfeit all rights given them under this ordinance and franchise.

Section 11. Should said grantees, their successors and assigns, wilfully and negligently fail to perform any of the duties imposed upon them in this franchise for twenty (20) days after notice so to do from the properly constituted governing authorities of said town, then and

in that event, they shall forfeit all rights and privileges given them under this franchise; provided, such failure is not caused by the Acts of God or the public enemy, or by accident or incident beyond the control of said grantees, their successors and assigns.

Section 12. That in supplying lights to said town, they shall be supplied in such units and located as directed by the proper authorities of said town.

Section 13. That the lights supplied to said town shall be furnished with Tungsten lamps (provided, said town does not exercise its option to make magnetite arcs) provided, said grantees, their successors and assigns, may change to another lamp of equal efficiency in light giving, at any time they may see fit: provided, that before making said change, said change shall be endorsed and approved by the duly constituted governing authorities of said town.

Section 14. That until August 1, 1913, the provisions herein concerning the keeping of the lights supplied said Municipality burning every night from thirty (30) minutes before sundown until thirty minutes (30) after sun-rise shall not become operative, and
17 that until August 1, 1913, when said provisions shall become operative, said grantees, their successors and assigns shall supply said Municipality with the lights of the same kind and capacity, and on the same schedule, as those being supplied at the date of the passage of this ordinance, at the rate of Forty Dollars ($40.00) per year for each Two Hundred and Fifty (250) Watt Tungsten Multiple lamp, and that on and after August 1, 1913, the rate for Municipal lighting hereinbefore provided shall become operative, and said lights so supplied said Municipality shall be supplied every night from thirty minutes before sundown, until thirty (30) minutes after sunrise.

That the provisions herein contained as to the rates at which current for lighting or other purposes taken from the lighting circuit so to be supplied to persons, firms and corporations in said town, shall become operative April 1, 1913, but the provisions herein contained so to a continuous current on the lighting circuit shall not become operative until October 15th, 1913.

Section 15. That said grantees their successors and assigns may at any time transfer, assign and convey all the rights hereby given them for the supplying of water to said Municipality and the individuals, firms and corporations thereof, so they may at any time transfer, assign and convey all the rights and privileges given them under this franchise for the supplying of lights and current for lights and power to said municipality or the individuals, firms and corporations thereof, without in any way forfeiting or affecting any of their rights which they do not transfer, assign and convey.

Section 16. If the said grantees, their successors and assigns, should fail to signify their acceptance of this amended franchise and ordinance, and in said acceptance waive all of their rights and privileges under the ordinance, contract and franchise, heretofore granted them

with- sixty (60) days from the date of the passage of this ordi-
18 nance, franchise and contract, then the same shall become void, and upon the filing of said acceptance, all ordinances or parts of ordinances in conflict herewith are repealed.

Section 17. The franchise, rights and privileges hereby granted shall exist for a period of fifty (50) years.

North Carolina,
Alamance County.
Town of Graham:

I, A. P. Williams, Secretary to the Board of Commissioners of the Town of Graham, Alamance County, North Carolina, do hereby certify that the foregoing is a true and perfect copy of an ordinance granting certain franchise to the Graham Water & Electric Company, passed at a regularly and duly called and held special meeting of the Mayor and Board of Commissioners of said town, on the evening of Wednesday, the 26th day of March, 1913.

In witness whereof, I have hereunto set my hand and official title and the seal of said town, this the 18th day of April, 1913.

A. P. WILLIAMS,
Secretary of Board of Commissioners of the Town of Graham, Alamance County, North Carolina.

I hereby certify that the foregoing is a true and correct copy of ordinance passed and accepted by the Board of Commissioners of the town of Graham with reference to the franchise and other powers granted the Graham Water & Electric Company by the duly constituted municipal authorities of this town under the dates and under the conditions, as shown by copies of franchise and other data attached hereto.

Dated this the 27th day of September, 1919.

P. A. HALL,
Clerk to Board of Commissioners of the town of Graham.

19 *Public Laws of North Carolina, Session* 1917.

Chapter 136.

Chapter III. Regulation of Public Utility and Quasi-Public Utility Corporations.

Section 1. The Corporation Commission shall have full power and authority to fix and establish any and all rates which any public-service or quasi public-service corporation other than railroads using steam as a motive power shall charge or exact from any person, firm or corporation in any city for the services rendered or commodity furnished.

Chapter 127.

An Act to Regulate Electric Light, Power, Water and Gas Companies.

The General Assembly of North Carolina do enact:

Section 1. The Corporation Commission shall have such general power, control and supervision of all electric light, power, water and gas companies and corporations, other than such as are municipally owned or conducted, and of all persons, companies and corporations, other than municipal corporations, now or hereafter engaged in the business of furnishing electricity, electric light current or power and gas, as it now has over railroad and other corporations as set forth in chapter twenty of The Revisal of one thousand nine hundred and five and the acts supplemental and amendatory thereof.

Sec. 2. That the said commission shall have full power and authority to fix, establish and regulate the rates or charges of such persons, companies or corporations, to make such investigations and orders, and establish and enforce rules, regulations, fines and penalties as it has over railroads.

Sec. 3. That when any such rates or charges are fixed, established or promulgated by the commission the same shall be deemed just, reasonable and proper, and any rate or charge whatsoever made and collected by any such persons, company or corporation other than that fixed, established or promulgated by the commission, shall be deemed unjust and unreasonable.

Sec. 4. Any person, company or corporation affected by any order or decision of the Corporation Commission under this act may except to any rates, charges, rules, regulations, orders or findings of the commission and appeal therefrom to the Superior Court in the same manner as provided in cases of other appeals from said commission.

Sec. 5. All proceedings before the commission in regard to such corporations, including the right of appeal, shall be the same as prescribed for railroads.

Sec. 6. The Corporation Commission shall make reasonable and just rules and regulations:

1. To prevent discrimination in furnishing electricity, electric light, current, power, or gas.

2. To prevent the giving, paying or receiving of any rebate or bonus, directly or indirectly, or the misleading or deceiving the public in any manner as to real rates or charges for electricity, electric lights, current, power or gas.

Sec. 7. It is the intention of this act to give the said Corporation Commission the same control, power and supervision over such persons, companies and corporations named in this act as it has over railroad corporations in this State.

Sec. 8. Any and all laws or clauses of laws in conflict with this act are hereby repealed.

Sec. 9. This act shall be in full force and effect from and after its ratification.

In the General Assembly read three times and ratified this the 11th day of March, 1913.

21 *Equity Subpœna.*

In the District Court, Fourth Circuit, at Greensboro.

Filed November 1, 1919.

UNITED STATES OF AMERICA:
Western District of North Carolina:

The President of the United States of America to the Marshal of the Western District of North Carolina, Greeting:

You are hereby commanded to summons, Town of Graham, R. L. Holmes, Mayor, J. C. Walker, James Rich, J. Harvey White, J. Elmer Long, and R. G. Foster, Commissioners of the Town of Graham, and Mutual Power & Light Company, Citizens of and residents in the State of North Carolina, if *he* be found in your District, to be and appear in the District Court of the United States, for the Western District of North Carolina, aforesaid, at Greensboro, on the 18th day of November, next to answer a certain bill in chancery, filed and exhibited in said Court against them by Piedmont Power & Light Company, citizen of and resident in the State of North Carolina, to receive perform and abide any order, judgment or decree of the Court made therein.

Hereof you are not to fail, under the penalty of law thence ensuing, and have you then and there this writ.

Witness the Hon. Jas. E. Boyd, Judge of the District Court of the United States at Greensboro in said District, the 28th day of October, 1919, and in the One Hundred and Forty Fourth year of the Independence of the United States.

Issued the 28th day of October, 1919.

R. L. BLAYLOCK,
Clerk,

By H. M. CAUSEY,
Deputy Clerk.

The defendant is required to file his answer or other defense in the Clerk's Office on or before the 20th day after service, excluding the day — thereof, otherwise the bill may be taken Pro Confesso.

Marshal's Return.

Received October 29th, 1919.

Executed October 29th, 1919, by reading the within summons to each of the within named defendants in person and delivering a copy of same, together with a copy of the Bill of Complaint, to R. L. Holmes, Mayor of the Town of Graham, and Lynn B. Williams, Vice President of the Mutual Power and Light Co.

CHAS. A. WEBB,
U. S. M.

By C. T. ROANE,
D. M.

22 *Motion of Defendants to Dismiss Action.*

Filed November 5th, 1919.

In the District Court of the United States for the Western District of North Carolina, at Greensboro.

In Equity.

PIEDMONT POWER AND LIGHT COMPANY, Complainant,

v.

TOWN OF GRAHAM, R. L. HOLMES, Mayor; J. C. WALKER, JAMES RICH, J. HARVEY WHITE, J. ELMER LONG, R. G. FOSTER, Commissioners of the Town of Graham, and Mutual Power & Light Company, Defendants.

Motion.

Now comes the defendants Town of Graham, R. L. Holmes, Mayor, J. C. Walker, James Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham, and Mutual Power & Light Company, in the above entitled action and move the Court:

To dismiss this action for that there is insufficient allegation of fact to constitute a valid cause of action in equity against the defendants, or any of them, and it appears upon the face of the complaint that the plaintiff has no right to maintain this action in Court.

This November 5th, 1919.

JACOB A. LONG,
J. S. COOK,
Attorneys for Town of Graham and Commissioners.
C. W. TILLETT,
WM. P. BYNUM,
E. S. PARKER, JR.,
PARKER & LONG,
Attorneys for Mutual Power & Light Company.

23 *Decree.*

Filed November 18th, 1919.

In the District Court of the United States for the Western District of North Carolina, at Greensboro.

In Equity.

PIEDMONT POWER & LIGHT COMPANY, Complainant,

v.

TOWN OF GRAHAM, R. L. HOLMES, Mayor; J. C. WALKER, JAMES Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham; Mutual Power & Light Company, Defendants.

Decree.

This cause coming on to be heard upon motion of defendants to dismiss the complaint, and having been heard pursua-t to notices and orders heretofore given and made:

It is now ordered, adjudged and decreed that the complaint, filed in this suit be, and hereby is, dismissed, and that the restraining order hereby prayed for in the bill is hereby refused.

It is further ordered that the plaintiff be taxed with the costs.

Done in the District Court of the United States, for the Western District of North Carolina, at Greensboro, this the 18th day of November, 1919.

JAS. E. BOYD,
United States District Judge.

From this order the complainant prays an appeal, to the Supreme Court of the United States.

JAS. E. BOYD,
U. S. Judge.

24 *Petition for Appeal.*

Filed December 8, 1919.

In the District Court of the United States for the Western District of North Carolina, at Greensboro.

In Equity.

PIEDMONT POWER & LIGHT COMPANY, Complainant,

vs.

TOWN OF GRAHAM, R. L. HOLMES, Mayor; J. C. WALKER, JAMES Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham; Mutual Power & Light Company, Defendants.

Petition for Appeal.

To the Honorable James E. Boyd, Judge United States District Court for the Western District of North Carolina:

The above named Piedmont Power & Light Company, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 18th day of November, 1919 does hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and prays that its appeal be allowed and its citation be issued as provided by law, and that a transcript of the record proceedings and document upon which said decree was based, duly authenticated be sent to the Supreme Court of the United States, sitting at Washington, under the rules of such Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

PIEDMONT POWER & LIGHT COMPANY,
By J. H. BRIDGERS,
Solicitor for the Complainant.

The appeal prayed for is allowed upon giving bond as required by law for the sum of 500 Dollars.

JAS. E. BOYD,
U. S. Judge.

25 *Assignment of Errors.*

Filed December 8th, 1919.

In the District Court of the United States for the Western District of North Carolina, at Greensboro.

In Equity.

PIEDMONT POWER & LIGHT COMPANY, Complainant,

vs.

TOWN OF GRAHAM, R. L. HOLMES, Mayor; J. C. WALKER, JAMES Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham; Mutual Power & Light Company, Defendants.

Assignment of Errors.

Now comes the complainant in the above entitled cause and filed the following assignment of errors upon which it will rely upon the prosecution of its appeal in the above entitled cause, from the decree made by this Honorable Court on the 18th day of November, 1919, and says that the United States District Court for the Western District of North Carolina erred as follows:

1.

In dismissing the Bill of Complaint filed by the Complainant.

2.

In refusing the restraining order, and injunction prayed for.

3.

In not holding the franchise granted on March 25th, 1913, in which the complainant is the owner, is a valid grant of all the streets, and the use of same warranted to complainant, and that in attempting to grant the use of the same to any other person, firm or corporation is attempting to pass a law which impairs the obligation of a contract.

4.

In not holding that the ordinance attempting to grant a franchise to the Mutual Power & Light Company on September 1, 1919, was void; for that it was not passed as required by due process of law.

5.

In not holding that under the Statutes of the State of North Carolina, the defendants are without power to grant an additional franchise to carry on the electric power & Light business in the town of Graham.

6.

In not granting the relief as prayed for in the bill.

Wherefore complainant prays that said decree be reversed and that said District Court for the Western District of North Carolina be ordered to enter a decree reversing the decision of the lower Court in said cause.

J. H. BRIDGERS,
Solicitor for the Complainant.

26 *Order Allowing Appeal.*

December 8th, 1919.

In the District Court of the United States for the Western District of North Carolina, at Greensboro.

In Equity.

PIEDMONT POWER & LIGHT COMPANY, Complainant,

v.

TOWN OF GRAHAM, R. L. HOLMES, Mayor; J. C. WALKER, JAMES Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham; Mutual Power & Light Company, Defendants.

Order Allowing Appeal.

On motion of J. H. Bridgers Esq., Solicitor and counsel for complainant, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, exhibits, stipulations and all proceedings be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of $500.00.

December 8th, 1919.

JAS. E. BOYD,
U. S. Judge.

27 *Appeal Bond.*

Filed December 17, 1919.

Know all Men by these Presents That We, Piedmont Power & Light Company, as principal and John M. Cook and Junius H. Harden as sureties, are held and firmly bound unto the town of Graham, R. L. Holmes, Mayor, J. C. Walker, James Rich, J. Harvey White, J. Elmer Long, R. C. Foster, Commissioners of the town of Graham and the Mutual Power & Light Company in the full and just sum of Five Hundred ($500.00) Dollars to be paid to the said town of Graham, R. J. Holmes, Mayor, J. C. Walker, James Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the town of Graham and the Mutual Power & Light Company, certain atorney, executors, administrators or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents, sealed with our seals and dated this 16th day of December in the year of our Lord one thousand nine hundred and nineteen.

Whereas, lately at a District Court of the United States for the Western District of North Carolina, in a suit depending in said Court, between Piedmont Power & Light Company vs. The Town of Graham, R. L. Holmes, Mayor, J. C. Walker, James Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the town of Graham and the Mutual Power & Light Company, a decree was rendered against the said Piedmont Power & Light Company and the said Piedmont Power & Light Company, having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said town of Graham, R. L. Holmes, Mayor, J. C. Walker, James Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the town of Graham and the Mutual Power & Light Company, citing and admonishing each of you to be and appear at the Supreme Court of the United States to be holden at Washington on the day in the said citation mentioned:

28 Now the condition of the above obligation is such that if the said Piedmont Power & Light Company, shall prosecute their appeal to effect, and answer all damages and costs of, if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

PIEDMONT POWER & LIGHT CO.; [SEAL.]
By JUNIUS H. HARDIN. [SEAL.]
JOHN M. COOK. [SEAL.]
JUNIUS H. HARDIN. [SEAL.]

Approved by:
JAS. E. BOYD,
U. S. Judge.

29 *Citation.*

Filed 29th Day of December, 1919.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Town of Graham, R. L. Holmes, Mayor; J. C. Walker, James Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham; Mutual Power & Light Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on January 20th, 1920, next, pursuant to an appeal from a decree of the District Court of the United States for the Western District of North Carolina, in your favor passed in a case in said Court wherein the Piedmont Power & Light Company is complainant, vs. the Town of Graham, R. L. Holmes, Mayor, J. C. Walker, James Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham, Mutual Power & Light Company, and you are defendants & Appellees to show cause, if any there be, why the decree rendered against the said Complainant in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James E. Boyd, Judge of the District Court of the United States for the Western District of North Carolina, this 29th day of December, in the Year of Our Lord one thousand nine hundred and nineteen.

JAS. E. BOYD,
Judge of the District Court
of the United States.

Service of the within Citation accepted, this December 30th, 1919.

JAMES S. COOK,
Att'y for Town of Graham.
E. S. PARKER, JR.,
Of Counsel, Mutual Power
and Light Company.

30 *Præcipe.*

Filed December 23, 1919.

In the District Court of the United States for the Western District of North Carolina, at Greensboro.

In Equity.

PIEDMONT POWER & LIGHT COMPANY, Complainant,

vs.

TOWN OF GRAHAM, R. L. HOLMES, Mayor; J. C. WALKER, JAMES RICH, J. HARVEY WHITE, J. ELMER LONG, R. G. FOSTER, Commissioners of the Town of Graham; Mutual Power & Light Company.

Hon. R. L. Blaylock, Clerk U. S. District Court, at Greensboro, N. C.

SIR:

You are hereby requested to certify to the Supreme Court of the United States, as the record of the case on appeal in this action the following:

Bill of Complaint.
With Exhibit in full: (*a*) Burlington Franchise, (*b*) Chapter 127 Public Laws of North Carolina of 1913, (*c*) Sec. 1 of chapter 136 of sub-chapter III Public Laws of North Carolina of 1917.
Subpœna.
Motion of Defendants.
Decree of November 18, 1919.
Petition for appeal.
Order allowing appeal,
Assignment of errors.
Citation of appeal.
Bond of appeal.
Precept to Clerk U. S. District Court.
December 15th, 1919.

J. H. BRIDGERS,
JOHN J. HENDERSON,
Solicitors for Complainants.

Service accepted, December 18th, 1919.

E. S. PARKER, JR.,
Of Counsel for Mutual Power & Light Co.
J. S. COOK,
JACOB LONG,
Attorneys for Town of Graham and Officials.
WM. P. BYNUM,
Of Counsel for Mutual Power & Light Company.

31 *Order to Transmit Record.*

UNITED STATES OF AMERICA,
Western District of North Carolina:

In the District Court, at Greensboro.

And thereupon it is ordered by the Court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereupon relating so far as the same is embraced in the Præcipe filed by Counsel, be transmitted to the said Supreme Court of the United States; and the same is transmitted accordingly.

Test:

R. L. BLAYLOCK,
Clerk.

Clerk's Certificate.

I, R. L. Blaylock, Clerk of the United States District Court for the Western District of North Carolina, at Greensboro, do hereby certify that the foregoing is a true and correct transcript according to the Præcipe hereto attached as appears from the original papers in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office in City of Greensboro, in said District, on this the 13th day of January, A. D. 1920.

[Seal United States District Court, Western Dist. of N. C.]

R. L. BLAYLOCK,
Clerk of the U. S. District Court.

Endorsed on cover: File No. 27,439. W. North Coralina D. C. U. S. Term No. 684. Piedmont Power & Light Company, appellant, vs. The Town of Graham et al. Filed January 22d, 1920. File No. 27,439.

Office Supreme Court, U. S.
FILED
MAR 18 1920
JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 684.

PIEDMONT POWER & LIGHT COMPANY, APPELLANT,

vs.

THE TOWN OF GRAHAM ET AL.

MOTION TO DISMISS OR AFFIRM OR TRANSFER TO THE SUMMARY DOCKET.

JAMES S. COOK,
JACOB A. LONG,
CHARLES W. TILLETT,
SIDNEY S. ALDERMAN,
WILLIAM P. BYNUM,
Counsel for Appellees.

(27,439)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 684.

PIEDMONT POWER & LIGHT COMPANY, APPELLANT,

vs.

THE TOWN OF GRAHAM ET AL., APPELLEES.

MOTION TO DISMISS OR AFFIRM OR TRANSFER TO THE SUMMARY DOCKET.

To Piedmont Power & Light Company, appellant, and its counsel:

The Town of Graham et al. hereby give notice that they will on Monday, the 5th day of April, 1920, submit to the Supreme Court of the United States, at the Capitol, at Washington, D. C., motion in the above-entitled suit to dismiss the appeal or to affirm the judgment or to transfer the case to the summary docket, a copy of said motion, together with brief in support of the same, being herewith delivered to you.

THE TOWN OF GRAHAM ET AL.,
By JAMES S. COOK &
JACOB A. LONG,
CHAS. W. TILLETT,
SIDNEY S. ALDERMAN,
WM. P. BYNUM,
Counsel for Appellees.

The foregoing notice is hereby accepted and delivery of copy of same together with copy of motion and brief in support of same are hereby acknowledged, this the — day of March, 1920.

PIEDMONT POWER & LIGHT COMPANY,
By J. H. BRIDGES,
J. J. HENDERSON,
Counsel for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 684.

PIEDMONT POWER & LIGHT COMPANY, *Appellant*,

vs.

THE TOWN OF GRAHAM ET AL., *Appellees*.

Motion to Dismiss Appeal or to Affirm Judgment or to Transfer to Summary Docket, with Statement and Argument of Defendants, Appellees.

Motion to Dismiss Appeal or to Affirm Judgment or to Transfer to Summary Docket.

Now come defendants, appellees, by their attorneys of record herein, and move this honorable court:

First. To dismiss the appeal or to affirm the judgment, for that the United States District Court for the Western District of North Carolina had no jurisdiction of the suit, and the suit was properly dismissed by the said court; or,

Second. To affirm the judgment of the United States Dis-

trict Court for the Western District of North Carolina on the ground that it is manifest that the contentions of the appellant in this case are so entirely without merit as not to need further argument; or,

Third. In the event the court should refuse to dismiss or to affirm, the appellees move that this cause be transferred to the summary docket of this court, for that the points involved in the case are of such character as not to justify extended argument.

JAMES S. COOK,
JACOB A. LONG,
CHAS. W. TILLETT,
SIDNEY S. ALDERMAN,
WM. P. BYNUM,
Counsel for Defendants, Appellees.

BRIEF IN SUPPORT OF MOTION.

The defendants' counsel have made a motion in No. 685 similar to the motion made in this case, and the court is asked to consider both of these cases at the same time. The suit which is the basis of the appeal in No. 685 was commenced in the District Court of the United States for the Western District of North Carolina on the 17th day of September, 1919, and was heard before his honor the judge of said court and the suit dismissed on the 4th day of October, 1919.

On the 8th day of October, 1919, the same counsel, representing the same interests, commenced this suit in the same court in behalf of the complainants in this suit against these same defendants. The case at bar came on for hearing before the same judge on the 18th day of November, 1919. The case was heard by the judge on the bill of complaint, which was dismissed.

A moment's consideration of the two bills of complaint will disclose the fact that while the complainants are not

the same in both cases, the two actions had the same purpose, and the complainants in each of the cases represent the same interests.

Main Grounds of This Motion.

The defendants submit that the judgment of the district court dismissing the bill of complaint should be sustained, because:

1. All of the parties to the suit are citizens of the State of North Carolina, and there is no real and substantial Federal question involved in the case.

2. Even if the court should hold that technically the complainant had presented a Federal question, yet the bill of complaint states no cause of action, and is entirely without merit.

A Brief Analysis of the Bill of Complaint.

1. The bill shows that the complainant is a corporation of the State of North Carolina and that all of the defendants are citizens likewise of the State of North Carolina.

2. Complainant avers that it is engaged in the business of furnishing electric current for power and lights and has invested for that purpose $200,000 in serving the town of Graham, North Carolina, and that the town of Graham has granted to the complainant a franchise which is fully set out as Exhibit A attached to the complaint.

The franchise is in the form ordinarily used by cities and towns of the State for that purpose. It permits the company to use the streets of the town for erecting its poles, wires and other equipment, "subject to conditions and limitations" which are set out.

Complainant seems to rely upon that part of section 4 of the franchise which provides that "said town of Graham

hereby warrants that it will by its proper authorities provide for the full and free use of its streets, lanes, alleys, and bridges, as provided in section 1133 of the Revisal of 1905."

Section 1133 of the Revisal of 1905 reads as follows:

> "1133. Special Powers of Gas and Electric Companies.—Gas and electric light and power companies shall have power to lay, extend, construct, build, erect, maintain, repair, and remove all necessary or convenient towers, poles, cable wires, conductors, lamps, fixtures, appliances, appurtenances, in, upon, through and over any and all roads, streets, avenues, lanes, alleys, and bridges within and near any city, town or village where said company may be located; and all such roads, streets, lanes, alleys, and bridges shall be left in as good condition as they were in at the time of using them as aforesaid: Provided, that the rights and privileges conferred in this section shall not be exercised unless the authorities of such city, town or village first give their consent, and afterwards the said authorities shall have full power to control the location of all towers, poles, wires, conductors and all other fixtures, appliances and appurtenances belonging to or operated by any of said companies."

3. The important feature of the franchise, to which the court's attention is especially called, is that the franchise nowhere discloses that it was intended to be exclusive, nor is there any averment in the bill of complaint that the town of Graham had the right to grant an exclusive franchise to any electric company or other public service corporation.

The bill of complaint sets out a franchise which it alleges the town of Graham is attempting to grant to the Mutual Power & Light Company. It appears from the terms of this franchise that the defendant, the Mutual Power & Light Company, is granted the right to engage in the business of an electric power and light company in the town of Graham, but the rights of the Piedmont Power & Light Company are expressly safeguarded by section 3 of the grant to the Mutual Power & Light Company, which reads as follows:

> "Section 3. The said grantees, their successors and assigns shall not in any way interfere with any poles, wires, water mains, hydrants, or any appliances connected with the system of water works, sewerage, gas pipes, electric or telephone companies maintained in said town, or that hereafter may be legally placed or erected in said town." *

We also call attention to section 7 of the grant, which is as follows:

> "Section 7. The said grantees, their successors and assigns, shall only erect and maintain its poles, towers, conduits, wires or other appliances upon, over, and under such public streets, alleys or ways, in the corporate limits of said town as this board, or its successors, shall designate upon application by said grantees, their successors and assigns."

4. The bill of complaint further sets out that the ordinance by which the town attempted to grant the franchise to the Mutual Power & Light Company was void because it had not been properly passed by the board of commissioners of the town, in that only two out of four of the board voted for the ordinance.

The bill further sets forth that under the laws of the State of North Carolina, the proper course for the defendants to pursue would be to apply to the State Corporation Commission to have the rates charged by the complainant regulated.

In other words, the complainant avers in this bill of complaint that the defendant, the Mutual Power & Light Company, has no right whatever *under the laws of the State of North Carolina*, and if the averments in the bill of complaint are true, then the complainant can go into the State courts and have all of its wrongs redressed under the State laws.

5. The particulars in which the complainant attempts to invoke the Federal Constitution are found in the last clause of paragraph 9 of the complaint, which reads as follows:

"By attempting to grant another franchise to exercise the same rights and privileges as heretofore granted, or any portion thereof, is taking property and impairing a contract, and is a violation of the Constitution of the United States and of Complainant's rights thereunder."

And in articles 20, 21, and 22, which read as follows:

"20. That the Board of Commissioners of the Town of Graham by attempting to grant a franchise to the Mutual Power & Light Company for the purpose of dividing the volume of business now done by the Piedmont Company, is attempting to take the property of complainants without due process of law, in violation of Article XIV of the Constitution of the United States. The complainants invoke the protection of said article in their behalf.

"21. That due process of the law in the circumstances herein set out, would be by a hearing before the Corporation Commission of North Carolina at the instance of any town, city, person, firm or corporation aggrieved at the rates charged, or service furnished by the Piedmont Company.

"22. That unless the defendants are enjoined, the complainants will be deprived of their property without due process of law guaranteed to them under the Constitution of the United States."

Also in article 27, which is as follows:

"27. This investment was made in good faith by complainants relying upon the protection of the contract and due process clauses of the Constitution, which complainant believes and alleges the defendants are attempting to violate."

6. There are some averments in the bill with reference to the application by the defendant to the city of Burlington, and it is averred in the bill that the same conditions exist in

Burlington with reference to the franchises that do in the town of Graham.

7. The complainant concludes by a prayer for judgment that the ordinance granting the franchise to the defendant, the Mutual Power & Light Company, be declared void, and that the town of Graham and its officers be enjoined from certifying the ordinance, and that the defendant, the Mutual Power & Light Company, be enjoined from acting under it, etc.

ARGUMENT.

The Bill of Complaint Properly Dismissed for Want of Jurisdiction.

In view of the fact that all of the parties to this action are citizens of the State of North Carolina it is apparent that the Federal court has no jurisdiction unless the bill of complaint discloses a substantial controversy arising under the Federal Constitution. It is confidently submitted that a casual consideration of the bill of complaint will disclose that no right of the complainant arising under the Federal Constitution is involved in this suit.

The main reliance of the complainant under the Federal Constitution appears to be that inasmuch as the complainant has a franchise to do an electric power and lighting business in the town of Graham it would be taking the complainant's property without due process of law for the town of Graham to grant a franchise to the defendant, the Mutual Power & Light Company, and thus enable this defendant to divide the volume of business now being done by the complainant.

Under our view of the case this court is really not called upon to discuss the merits of this proposition, because of the fact that the complainant avers in the bill that the ordinance granting the franchise to the defendant, the Mutual Power & Light Company, is void, and the complainant

further avers that under the State law the proper course for the defendants to pursue would be to apply to the State Corporation Commission to fix the rates to be charged by the complainant.

In other words, a fatal objection to the maintenance of this bill of complaint in the Federal court at the very outset is that from the averments in the bill it is apparent that in no aspect of the case is the complainant being deprived of its property without due process of law under the Fourteenth Amendment, because the acts complained of are violative of the State law, and therefore should be redressed by the State courts.

This precise question is decided by this court in the case of Barney *vs.* City of New York, 193 U. S., 430 (48:737). The headnote sets forth the gist of the decision, as follows:

> "The averment in a bill to enjoin the construction of a rapid transit railroad tunnel under a city street that, by such construction complainant, as an abutting owner, is deprived of his property without due process of law, does not bring the case within the jurisdiction of a Federal circuit court, where the bill, on its face, proceeds on the theory that the action sought to be enjoined was not only unauthorized, but was forbidden by State legislation."

In the opinion, Mr. Chief Justice Fuller, for the court, says:

> "Controversies over violations of the laws of New York are controversies to be dealt with by the courts of that State. Complainant's grievance was that the law of the State had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the State; and the principle is that it is for the State courts to remedy acts of State officers done without the authority of, or contrary to, State law." (Citing numerous cases.)

It is therefore submitted that under the case just cited and under the allegations of the bill of complaint, the complainant has no standing in the Federal court.

It may be argued by counsel that complainant also relies upon section 10 of article I of the Constitution, which provides: "No State shall * * * pass any * * * law impairing the obligation of contracts." It may be contended by complainant's counsel that the franchise granted by the town of Graham was a contract and that the granting of a franchise to the Mutual Power & Light Company would be an impairment of the obligations of this contract.

Here again it is apparent that from the allegations of the bill of complaint, that the State of North Carolina has not authorized any of the acts of which the complainant complains; on the contrary, the complainant avers that the attempt to grant the franchise to the defendant is void under the laws of the State of North Carolina, and that all the acts complained of are violative of the complainant's rights under the State law.

It is therefore apparent, we submit, that under the decision in the case of Barney *vs.* City of New York, *supra*, this court is without jurisdiction to determine the questions presented in the bill of complaint, as they are questions purely of State law.

But if we should pass this question by, we still maintain with confidence that this court has no jurisdiction of this cause of action, because the bill of complaint does not present a case which really and substantially involves a dispute or controversy under the Constitution of the United States. The rule in this respect is clearly stated in 4 Encyclopedia of United States Supreme Court Reports, page 908, as follows:

> "*Necessity for Federal Question to be Real and Substantial.*—In order for a suit to be justiciable in the Federal courts, as one arising under the Constitution or laws of the United States, it must be one which really and substantially involves a dispute or controversy as to the construction of the Constitution or

> some law or treaty of the United States. The mere averment of a question arising under the Constitution or laws of the United States is not sufficient to give jurisdiction to the Federal courts, where the question sought to be presented is so wanting in merits as to be frivolous or without any support whatever in reason."

For this proposition of law there is cited a large number of cases from this court.

How can it be seriously contended that this bill of complaint really presents a question under the Constitution of the United States?

We may admit that the franchise granted to the complainant (or to the corporation to whose rights it succeeded) by the town of Graham constitutes a contract with the town of Graham. The real question is, what are the terms of the contract? It nowhere appears from the terms of this "contract" that the complainant has any rights which are being invaded by any of the acts of which the complainant complains. It nowhere appears that the State of North Carolina has authorized any of the acts complained of which it is averred constitute an impairment of the obligations of the "contract."

Likewise there is no averment that the franchise granted to complainant was "exclusive." Unless the franchise granted to the complainant was exclusive, how can it be seriously argued that to grant a franchise to another company would be depriving the complainant of its property without due process of law?

It is therefore submitted that from whatever angle the question is viewed, the attempt of the complainant to bring this case under any of the provisions of the United States Constitution is fictitious, and the suit should be dismissed.

The Bill of Complaint States no Cause of Action.

Apart from the question of jurisdiction referred to above, the bill of complaint states no cause of action, and the suit is entirely without merit.

The sole basis of the complainant's alleged cause of action is that the franchise granted by the town of Graham to the complainant (or to the corporation to whose rights it succeeded) constitutes a contract between complainant and the town of Graham, under the terms of which the complainant is entitled to an exclusive franchise, and that granting a franchise to the defendant, the Mutual Power & Light Company, is an invasion of complainant's contract rights under its franchise; and complainant further contends that inasmuch as it has an exclusive franchise, the granting of another franchise to the defendant, the Mutual Power & Light Company, is a taking of the complainant's property without due process of law.

It is submitted that this contention is entirely without merit, from several standpoints:

1. The franchise granted to complainant, which is set out in full, does not purport to be an exclusive franchise, and there is nothing in it from which any inference could be drawn that it was exclusive.

Its counsel relied in the court below upon the part of the franchise that warrants to the complainant that the town will "by its proper authorities provide for the full and free use of its streets, alleys, lanes and bridges, as provided for in section 1133 of the Revisal, etc." The section referred to seems to *require* all cities and towns to grant these franchises to all these public-service corporations, subject to the supervision and restrictions of the municipal authorities. Instead of aiding the complainant's argument, this is a direct refutation of the same.

How can it be seriously argued that because the municipality, in compliance with the State statute, granted the free use of the streets of the city to the complainant, subject to the municipal regulations, this constitutes an exclusive right to use the streets?

Besides that, we call attention to the fact that section 3 of the franchise granted to the defendant (Rec., top page 5) expressly provides that the defendant shall not in any way interfere with any poles or other equipment then being maintained by any other electric company, thus expressly forbidding the defendant to interfere with any of the equipment of the complainant.

2. But suppose, for the sake of the argument, that the franchise granted to the complainant was by its express terms intended to be an exclusive franchise. The question still remains as to whether under the laws of the State of North Carolina an exclusive franchise could lawfully be granted. This is undoubtedly a question of State law and involves no Federal question whatever.

In the case of Thrift *vs.* Elizabeth City, 122 N. C., 31, the third headnote correctly sets forth the decision on this point, as follows:

> "A contract or ordinance of a city attempting to grant any exclusive privilege for the construction of water works, etc., and the exclusive use of its streets, etc., for any purpose, comes within the prohibition against monopolies and perpetuities contained in section 31 of article I of the State Constitution, even though such grant is made as an incentive or inducement to the establishment and maintenance of works contributing to the health, comfort or convenience of the public."

Here, then, it will be seen that even if the town of Graham had attempted to grant an exclusive franchise to the complainant, and this had been done pursuant to legislative

authority, such an exclusive grant would have been violative of the State constitution and therefore void.

3. The settled policy of the State of North Carolina is to encourage as many electric companies as will furnish service of this character to the people of the State. Section 1571 the Revisal of North Carolina expressly gives to all such electric companies duly incorporated "the right to construct, maintain and operate such lines along * * * public highways," and the streets of towns and cities are universally held to be public highways.

4. There is no averment in the bill of complaint that the town of Graham had legislative authority to grant an exclusive franchise, and it has been held by this court and all other courts that have passed upon the question, that before an exclusive franchise or a monopoly can be granted by a municipality such municipality must have clear legislative authority to grant the same, and it must appear that the exclusive privilege has been expressly granted. Such an exclusive privilege cannot be granted by inference or implication.

Detroit Citizens Ry. Co. *vs.* Detroit Ry. Co., 171 U. S., 48 (43:67).

Water, Light & Gas Co. *vs.* Hutchison, 207 U. S., 383.

See also 22 L. R. A., N. S., 934 *et seq.*, citing a multitude of cases involving franchises to all kinds of public-service corporations.

Under the rule of construction in favor of the public, a public-service company, such as an electric lighting company, gas, or water company, will not be held to have secured an exclusive franchise or monopoly unless the intention to grant it clearly appears.

12 C. J., 1033, and cases cited in Notes 49, 50 and 51.

5. If a franchise be granted in terms which are not exclusive, there is no constitutional obligation on the State

or municipality not to grant to another corporation a similar franchise, even though the latter greatly impairs the value of the former.

12 C. J., 1032, and cases cited in Note 41, among them the following U. S. and N. C. cases:

Stein *vs.* Bienville Water Supply Co., 141 U. S., 67.

Washington, etc., Co. *vs.* Maryland, 3 Wall., 210.

Bridge Proprietors *vs.* Hoboken Land Co., 1 Wall., 116.

Fanning *vs.* Gregoire, 16 How., 524.

Charles River Bridge Co. *vs.* Warren Bridge, 11 Pet., 420, the famous leading case on the question.

Allen *vs.* Buncombe Turnpike Co., 16 N. C., 119.

Accordingly, no compensation need be made to the first corporation for the consequential injury arising out of grant of a similar franchise to another corporation.

12 C. J., 1032, and cases cited Note 43.

For all of these reasons we respectfully submit that the bill of complaint presents no case of merit, and should be dismissed.

JAMES S. COOK,
JACOB A. LONG,
CHAS. W. TILLETT,
SIDNEY S. ALDERMAN,
WILLIAM P. BYNUM,
Attorneys for Defendants, Appellees.

[Endorsed:] Filed No. 27,439. Supreme Court, U. S. October Term, 1919. Term No. 684. Piedmont Power & Light Co., appellant, *vs.* The Town of Graham et al. Motion to dismiss or affirm or transfer to the summary docket, notice and proof of service. Filed March 18, 1920.

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No. 684.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

PIEDMONT POWER AND LIGHT COMPANY, APPELLANT.

against

TOWN OF GRAHAM, ET AL.

BRIEF OF COUNSEL FOR APPELLANTS ON DEFENDANTS' MOTION TO DISMISS THE APPEAL OR AFFIRM THE JUDGMENT.

STATEMENT OF THE CASE.

This is an appeal from the final decree of the District Court of the United States for the Western District of North Carolina on 18th day November 1919, dismissing the case on the merits and denying the injunction.

The bill of complaint was for an injunction to restrain the Town of Graham from granting an additional franchise for carrying on the electric light and power business, within the corporate limits of the Town of Graham, to the defendant Mutual Power & Light Company, to declare the ordinance purporting to grant a franchise to the Mutual Power & Light Company void, and to restrain the individuals and the Commissioners of the Town from certifying the ordinance declared carried on September 1, 1919.

The appellant is the owner of a franchise granted by the Town of Graham on March 26, 1913, and set out in full in the record at page 10 *et seq.*, as Exhibit A.

Transcript of Record page 2.

The appellant is the owner of a modern and complete power plant situated midway between the Town of Graham and the City of Burlington which has cost over $700,000.00 and more than $200,000.00 is used in serving the citizens,

and in industries in the Town of Graham with electric current.

Transcript of Record page 2.

The defendant Mutual Power & Light Company is organized for the same purpose. It may be said in explanation that it is composed entirely of certain textile manufacturers in Alamance County who are dissatisfied at the rate charged them for current.

The defendant Town of Graham is a municipal corporation, a political subdivision of the State of North Carolina.

The Complainant contends:—

1. That the ordinance granted March 26, 1913, was within the power of the Town Board, lawfully granted and used, and was a special privilege granted it in consideration of public services, to wit: "to supply said Town with lights as desired by said Town, and to supply the individual firms and corporations with the current for lighting, and other purposes."

Transcript of Record page 10.

2. That such a grant is a contract protected by the Federal Constitution against impairment.

3. That said ordinance of March 26, 1913, contains a covenant of warranty "for the full and free use of its streets," etc.

Transcript of Record page 10.

4. That the State of North Carolina has enacted comprehensive legislation for regulating the conduct and rates for electric current, thereby amply protecting the public.

Transcript of Record pages 15, 16.

5. That the State of North Carolina by enacting the legislation referred to intended to limit the return on the investment of the Complainant, and intended to secure for its citizens the benefit of the entire volume of business produced by any community.

6. That the State of North Carolina by appropriate legislation set forth in full in the margin has declared

that such public necessity and convenience as light and power shall be sold at an uniform price, and that competition by price cutting is prohibited by law. See Chap. 41 Public Laws of N. C., 1913, Sec. 5 (a) (e)*

7. That there is no financial difference in taking the financial return from property, and in actually taking the physical property.

All the defendants appeared and made motion to dismiss for insufficiency of allegation to constitute of a valid cause of action, and denying right of Complainant to maintain the action in court.

The motion was heard by Judge James E. Boyd and decided upon the merits without any written opinion, and dismissed for want of equity.

The Complainant appealed to this Court.

CONSTITUTIONAL QUESTIONS INVOLVED

First, whether under the terms of the franchise owned by the Complainant, there is such a contract created, as comes within the protection of the Federal Constitution.

Second, whether a state may by statutory enactment limit the return on property devoted to public use, require absolute and full compliance with the letter of the grant, and thereafter pass an ordinance by one of the political subdivisions

*Sec. 5. That in addition to the matters and things hereinbefore declared to be illegal, the following acts are declared to be unlawful, that is for any person, firm or corporation, or association to directly or indirectly do or have any contract, express or knowingly implied, to do any of the acts or things specified in any of the subsections of this section.

(a) To agree or conspire with any other person, firm, corporation or association to put down or keep down the price of any article produced in this State by the labor of others, which said article said person, firm, corporation or association intends, plans, or desires to buy.

(e) Who deals in any thing of value within the State of North Carolina, to give away or sell, at a place where there is competition, such thing of value at a price lower than is charged by such person, firm, corporation or association, for the same thing at another place, where there is not good and sufficient reason, on account of transportation or the expense of doing business, for charging less at the one place than at the other, with the view of injuring the business of another.

thereof, divide the benefits of the grant unless it takes property without due process of law, and without just compensation, so as to comply with the Fourteenth and Fifth Amendments to the Federal Constitution.

SUMMARY OF POINTS.

THE FACTS.

The averments of the bill stand admitted by the motion to dismiss, which are that Complainant has invested $200,000.00 to supply the Town, citizens and industries of Graham with electric current for lighting, and other purposes under a franchise lawfully granted and accepted.

Without any claim of inadequate supply, or other reason without application to the rate making body of the State the governing authorities of the Town of Graham declare an ordinance granting a franchise for the same purpose to another passed.

This ordinance was declared passed by a Board, composed of five members elected, one of which was absent, one did not vote on account of interest, two voted for passage, and one against.

Transcript on Record page 6.

Section 19 of the Charter of the Town of Graham is set out in the bill, and is as follows:

> Section 19 of the Charter of the Town of Graham is set the power to make such by-laws and adopt such ordinances for the government of said town as a majority of them may deem necessary to promote the interests and insure the good order of said town; for the improvements of the streets and the preservation of the health in the same, and to make all such other police regulations as the interests, comfort and convenience of the citizens of the said town may require.

POINTS.

As Constitutional questions are involved, the whole case comes here. Complainant urges the following points:

1. The Legislature intended to create a regulated monopoly in consideration of public service by enacting chapter 127, Public Laws 1913, set out in the bill.

2. The District Court had jurisdiction as there is drawn in question an authority exercised under the State of North Carolina, as being repugnant to the Constitution of the United States.

3. A municipality may not where the law of a state regulates the rate for light and power grant the franchise for its distribution to two parties, unless it takes property without compensation. *The franchise is indivisible in such circumstances.*

4. The Town of Graham, its citizens and industries can secure no benefits in service or rates for electric current by dividing the total business offered by the community.

The questions in the case are:—

Has the State created a regulated monopoly of the sale of electric current in the Municipal Corporations?

Can a franchise granted by a municipality where such a condition exists, in which the grantor "warrants that it will by its proper authorities, provide for the full and free use of its streets," etc., be granted to another without violating the Federal Constitution?

Has a municipality in North Carolina the power to grant an exclusive franchise?

Is the ordinance of a Board of Commissioners composed of five members, under a statute requiring a majority "to make such by-laws and adopt ordinances" valid when adopted at a meeting at which four were present, one was absent, one not voting on account of interest, and two voted for it, and one against it?

These questions were raised by proper assignment of errors in the petition for appeal.

Transcript of Record page 21.

ARGUMENT.

Constitutional Questions Involved.

This Court determines for itself whether a substantial Federal question is presented upon the bill, and if so, it determines all the questions presented, including questions of State Law, and irrespective of the disposition made of the Federal question.

> Green v. Louisville & Interurban R. Co., 244 U. S., 499 (61:1280)
>
> Cited in
>
> Lincoln Gas & Elec. Co. v. Lincoln, decided June 2, 1919.

This Court has decided that:—

"The grant resulting from the acceptance by the establishment of a plant devoted to the described public use," by a municipality "constituted a contract, and vested in the accepting individual or corporation, a property right protected by the Federal Constitution against impairment."

> Russell v. Sebastian, 230 U. S., 195 (58:912)

Any other view is out of harmony with the weight of authority.

> Owensboro v. Cumberland Tel. & Tel. Co., 230 U. S., 58 (57:1389)

If the State of North Carolina conferred the power on the Town of Graham to make the grant, the question is not open to dispute. See the list of cases cited in *Russell v. Sebastian, supra.*

The power of the municipality to make the grant owned

by Complainant is contained in paragraph 6 of Section 2916 of N. C. Revisal of 1905 which is as follows:—

> "To grant upon reasonable terms franchises for public utilities, such grants not exceed the period of sixty years, unless renewal at the end of the period; also to sell or lease any water works, lighting plants, gas or electric or any other public utility which may be owned by any city or town."

This statute was enacted by the General Assembly of North Carolina in pursuance of Article VIII, Section 4 of the State Constitution which provides for the organization of Towns and Cities.

The Supreme Court of North Carolina has held:—

That Municipal Corporations are the creatures of the Legislature, their powers may be curtailed, enlarged or withdrawn at the will of the creator, whose control over them is limited only by the restriction that no Statute will be enforced, *which impairs the obligation of a contract, interferes with vested rights,* or is in conflict with any provision of the organic law of the State or Nation.

State v. Johnson, 114 N. C., 846.

Section 2916, paragraph 6 of the N. C. Revisal of 1905 is the fullest authority to grant any franchise "upon reasonable terms" the governing authorities of the Town of Graham saw fit.

The second Constitutional question raised is, so far as I am able to find, an unadjudicated one, except in so far as the decisions of this Court throw light on it.

The State has given its Corporation Commission absolute authority over the property of the Complainant, except as may be restrained by the Federal Constitution.

This Court has uniformly upheld the power of the State to regulate the return on property devoted to public use, and has frequently said that governmental powers cannot

be taken from the people by any form of contract, but not so when a State or Municipality is acting in its proprietary capacity.

> Los Angeles v. Los Angeles G. & E. Corp., decided Dec. 8, 1919, and the cases there cited, defining the distinction between Governmental capacity and proprietary capacity.

In the *Los Angeles case, supra,* the Court held that the construction of a municipal electric lighting system is not in the exercise of a governmental power, but as the proprietor of the streets, and having granted to an earlier and lawful occupant of the field, it could not without compensation require the Company to clear the streets for it.

The State has retained its governmental power of Regulation and Rate making. The Municipality under these circumstances, had but one electric franchise to grant. I quote from the *Los Angeles case* the following:—

> "It is not necessary to repeat the reasoning or the examples of the cases cited above, by which and in which the different capacities of the city are defined and illustrated. A franchise conveys rights, and if their exercise could be prevented or destroyed by a simple declaration of a municipal council, they would be infirm indeed in tenure and substance. It is to be remembered that they come into existence by compact, having, therefore, its sanction, urged by reciprocal benefits, and are attended and can only be exercised by expenditure of money, making them a matter of investments and property, and entitled as such, against being taken without the proper process of law,—the payment of compensation."
>
> Los Angeles v. Los Angeles G. & E. Corp., at this term.

The other points made are fully answered under the argument on the Constitutional question.

What is the meaning of this clause in the franchise?

"Warrants that it will by its proper authorities provide for the full and free use of its streets."

Webster's Dictionary gives the following definition of *warrant*:

> *WARRANT*—Law. (a) To secure to, as a grantee an estate granted; to assure. (b) To secure to, as a purchaser of goods, the title to the same, to idemnify against loss. (c) To secure to, as a purchaser, the quality or quantity of the goods sold, as represented; to secure (a purchaser or grantee) by a warranty.
>
> *WARRANTY*—A collateral engagement or undertaking, express or implied, that a certain fact regarding the subject of a contract is, or shall be expressly or impliedly, declared or promised to be. Breach of such an engagement does not avoid the contract, but renders the warrantor liable for damages.

Warrant means possession as well as title.

Allen v. Chaffee, 38 Southern Rep., 186.

Warrant is construed as full covenant of seizin, good right to convey against incumbrances.

Rader v. McKin, 68 N. E. Rep., 473.

Has a Municipality in North Carolina the power to grant an exclusive franchise or a *"warranted" franchise in its legal meaning ?*

It has the power to grant "on reasonable terms"—N. C. Rev. 1905, 2916, page 6.

It is urged in the brief of counsel on the motion to dismiss that an exclusive franchise cannot be granted in North Carolina and the case of *Thrift v. Elizabeth City*, 122 N. C., page 31 is cited for the position.

The quotation in the brief of counsel for the appellees from the case of *Thrift v. Elizabeth City*, 122 N. C., page 31, are not the points decided in that case. The questions in that case are set out in the judgment of the lower court as follows:

The court below rendered the following judgment:

> "The court is of the opinion: 1st. That water works are not a necessary expense within the meaning of the Constitution. 2d. That it is beyond the power of the defendants to levy an increased tax for the purposes set out in the pleadings without further legislation approved by a majority of the qualified voters. 3d. That it is not within the power of the defendants to bind the corporation for thirty years' rental. It is adjudged upon the pleadings that the defendant be perpetually enjoined against proceeding further in the execution of said ordinance, or doing any of the acts or things set out in furtherance of or in discharge of such obligation growing out of said ordinance, or doing any of the acts or things set out in paragraph 10 of the complaint."

Thrift v. Elizabeth City, 122 N. C., at page 34.

But if it ever was the law it has been overruled. The *Thrift case* decided upon the authority *Mayo v. Commissioners*, 122 N. C., page 5 in 1898, at the same term as the *Thrift case*. In *Faucett v. Mt. Airy*, 134 N. C., page 125, the *Mayo* case was overruled by name.

The *Thrift case* never was law. The judge in writing the opinion apologized for the dictum.

The power to grant exclusive or special privileges is contained in Article 1, Section 7 of the Constitution of North Carolina as follows:—

ARTICLE 1, SECTION 7.

No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in the consideration of public services.

Under this clause public ferries are made exclusive.

Broadnax v. Baker, 94 N. C., 675.
In re Spease Ferry, 138 N. C., 219.

A power company subject to state regulation, is within the exception contained in Art. 1, Sec. 7 of N. C. Constitution.

Caro-Tenn Power Co., v. Hiawassee Power Co., 175 N. C., 638.

Why is a power company entitled to an exclusive privilege?

The answer is found in the duty imposed by

Atlantic Coast Line v. Corp. Commission, 206 U. S., page 1.

This court in considering the Georgia State Constitution which was a clause prohibiting a granting by the State said:—

"A conveyance in aid of a public purpose from which great benefits are expected is not within the class of evils that the constitution intended to prevent and is not within the meaning of the word as it naturally would be understood."

Georgia v. Cincinnati Southern Railway, 248 U. S., 26.

The Constitution of North Carolina in exact accord with the idea in the Georgia Constitution says that:—

"Special privileges shall be granted only in consideration of public services such as a Power Company renders when it submits its investment to public regulalation and is bound to supply service to all those included in the protection of the grant even unprofitable extensions where the entire operation is showing a reasonable return."

In the brief on the motion to dismiss the case of *Barney v. the City of New York*, 193 U. S., 430 (48:737), it is cited as authority to dismiss for lack of Federal jurisdiction on the ground that the averment of this bill is, that the attempt to grant the Mutual franchise is void.

Our case is like Siler v. Louisville Nashville R. R. Co., 213 U. S., 175 (53:753)

If no other ground for Federal jurisdiction was alleged the citation of appellees might be apt.

The brief of the appellees cites N. C., Rev. 1905, Sec. 1133, as authority for general franchises. I do not so read it. The proviso expressly reserves all power in regard to power lines in the governing authorities of the Cities and Towns.

The Complainant for the first time calls attention to the discrimination in the Mutual franchise as set out in Sec. 6 thereof at page 5 of the record.

The Mutual Company is exempt from any duty, is under no obligation to render any public service, showing clearly that the governing authorities are undertaking to grant a special privilege without requiring public service.

Referring again to the *Los Angeles case*, at this term the Complainant is unable to distinguish the difference upon it and its security holders between taking its earnings, and taking its physical property. In the *Los Angeles case* you did not permit the property to be taken. Suppose the Court permits this destruction of Complainant's property, by granting a franchise for the same purpose to another, and it becomes so weakened financially that it cannot serve the pub-

lic, or maintain the dangerous agency employed in a safe manner, thereby becoming a menace to life and property?

Then consider the Mutual grant a contract protected by the Federal Constitution, and it would be sustained, as it would be a proprietary grant, not even subject to State Regulation, as the State has no power over the municipal proprietary rights, when it once allows its cities and towns to so act.

REGULATED MONOPOLY IS NOT COMMON LAW MONOPOLY.

The decisions cited by the appellees are all from another period of our government. They refer to monopoly at common law, not to regulated controlled public duties.

Monopoly at common law had reference to competition and price cutting. This idea is now prehistoric.

I quote from article by Mr. Brandies, now Mr. Justice Brandies, in *Harpers Weekly* of Nov. 15, 1913.

MONOPOLY'S EASIEST WAY.

> "Americans should be under no illusions as to the value or effect of price cutting. It has been the most potent weapon of monopoly—a means of killing the small rival to which the great trusts have resorted most frequently. It is so simple, so effective. Far-seeing organized capital secures by this means the cooperation of the short-sighted unorganized consumer to his own undoing. Thoughtless or weak, he yields to the temptation of trifling immediate gain; and selling his birthright for a mess of pottage, becomes himself an instrument of monopoly."

Section 24 of the bill paints the picture of the generation and distribution of electric current in North Carolina. A map of the situation is contained at page 596 of Vol. 101, S. E. Rep., decided at the last term of the N. C. Supreme

Court in the case of the *Salisbury & Spencer Ry. Co., v. Southern Power Company.*

Section 25 of the bill avers that the Mutual property is leased to the Southern Power Company.

So that if monopoly is sought, it is by the Mutual Company acting as the means of introducing a company controlling all the hydro-electric power of the State.

The Complainant submits it has made out its case, that the Town of Graham is attempting to violate the contract clause of the United States Constitution, and the fifth and fourteenth amendments thereto.

That it is also attempting to do so by a violation of the State Law.

The decree should be reversed, the injunction granted, and a mandate issued to the Town of Graham and the Mutual Company to remove the poles and wire from the streets of Graham forthwith.

I respectfully repeat that in granting the franchise of March 26th, 1913, now owned by the Complainant, the Town of Graham acted in its proprietary capacity, and is bound thereby, and cannot again so act without compensation to Complainant.

The Complainant is subject to the police power of the State, but is not subject to injury by the Town of Graham or by any other person, firm or corporation acting in a proprietary capacity.

The State has appointed a place for the exercise of its police power with regard to the sale of electric light and power, and cities and towns now have none, under the act of 1913 set out in full at page 16 of the Transcript of Record.

Is the ordinance of Board of Commissioners composed of five members, under a Statute requiring a majority "to make such by-laws and adopt such ordinances," valid when adopted at a meeting at which four were present, one was absent, one not voting on account of interest, two voted for, one against?

It is to be noticed that the brief of Counsel submits argument on all questions but this one.

The case of *Lawrence v. Ingersoll,* decided in the Tennessee Supreme Court in 1889 the law governing the question is fully summed up and stated as follows:—

> "Thus it appears by concurrence of text-book, judicial, senatorial, congressional and legislative authority that the rule is settled that a majority of a definite body present and acting must vote for a candidate, in order to elect him, and that it is not sufficient that he receive a plurality of votes cast, or a majority, if blank ballots are excluded. His claim must not depend upon the negative character of the opposition, but upon the affirmative strength of his own vote; that it is not sufficient that a majority were not cast against him to be elected. The majority must be cast for him. 'So if a board of village trustees consists of five members, and all or four are present, two can do no valid act, even though the others are disqualified by interest from voting, and therefore omit or decline to vote. Their assenting to the measure voted for by the two will not make it valid. If three only were present, they would constitute a quorum. Then the votes of two, being a majority of the quorum would be valid.' Certainly so where the three are competent to act." 1 Dill. Mun. Corp. 217.
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> 6 L. R. A. at page 313.

In the case at bar the statute requires a majority of those elected by the people to vote for or against an ordinance. How can it be said that an ordinance not receiving a majority of the *definite number elected,* or even a majority of those present has been adopted? The Mayor has no vote unless in the case of a tie. The purpose of such statute is most wholesome. It requires those elected *to act,* and it prevents action, except by a majority.

It is to be noted in the bill that in Paragraph (h) of Section 18, that the customers of the Mutual Power & Light Company can be well supplied with power by the Piedmont Company at the same price for the same service without dividing the volume of business in the community, which division would make it necessary for the Piedmont Company to ask for an increased rate for its service. It is respectfully submitted that it is the legislative intention to make the furnishing of electric current for public purposes a regulated monopoly in the State of North Carolina, and that it is within the power of the municipality under the general law as set forth in the bill to make such a contract.

All of which is respectfully submitted.

JAMES H. BRIDGERS,
Counsel for the Complainant,

Henderson, North Carolina.
March 31, 1920.